

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
Washington, D.C.

*In re*

**DETERMINATION OF ROYALTY RATES  
AND TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(*Phonorecords IV*)**

**Docket No. 21–CRB–0001–PR  
(2023–2027)**

**BROADCAST MUSIC, INC.’S RESPONSE TO THE SERVICES’ SUR-REPLY IN  
FURTHER OPPOSITION TO BROADCAST MUSIC, INC.’S MOTION FOR A  
LIMITED MODIFICATION TO THE PROTECTIVE ORDER IN THE  
PHONORECORDS IV PROCEEDING**

Broadcast Music, Inc. (“BMI”)<sup>1</sup> submits this response to the *Services’ Sur-Reply in Further Opposition to Broadcast Music, Inc.’s Motion for a Limited Modification to the Protective Order in the Phonorecords IV Proceeding*, Dkt. 25720 (“Sur-Reply”) and in further support of its motion for a limited modification to the protective order in the *Phonorecords IV* proceeding. The Services’ Sur-Reply repeats and repackages the arguments set forth in their Opposition and fails to demonstrate why the modification to the Protective Order that BMI seeks should not be granted.

The Services have not established that they would be prejudiced by BMI’s proposed modification to the Protective Order, or otherwise impaired in their ability to litigate their claims. *See Sonix Tech. Co. Ltd. v. Yoshida*, 2014 WL 11878353, at \*2 (S.D. Cal. 2014). On September 29, the Judges found that good cause exists to stay production of the BMI License Agreements to the Services until this Motion is resolved. *See Order*, dated Sept. 29, 2021, Dkt. No. 25698. The

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in *Broadcast Music Inc.’s Motion for a Limited Modification to the Protective Order in the Phonorecords IV Proceeding*, Dkt. No. 25669, *Phonorecords IV*.

Judges further invited the Services to seek an adjustment to the case schedule to the extent that not having access to the BMI License Agreements would impair their ability to file their direct witness statements on October 13, 2021. *See id.* The Services did not seek an extension of the October 13 direct witness statement deadline, and instead filed their direct witness statements as scheduled, without access to the BMI License Agreements. *See, e.g.,* Dkt. Nos. 25774-25812. This makes clear that the BMI License Agreements are not necessary to the Services' direct cases in this proceeding and that the Services will suffer no prejudice if certain of their counsel's access to those BMI agreements remains limited going forward.

BMI's proposed modification to the Protective Order is exceedingly narrow. BMI seeks to screen only three outside counsel for the Services—Mr. Greenstein, Mr. Marks, and Mr. Wetzel—from viewing the BMI License Agreements.<sup>2</sup> Notwithstanding the small number of lawyers impacted by BMI's request, the Services invent a hypothetical scenario in which the Services may be inconvenienced if one of the three screened lawyers conducts a direct examination at trial and then has to leave the courtroom for a few minutes during cross-examination if the BMI License Agreements are discussed. Any such inconvenience would be entirely of the Services' own making if they chose to have one of the three screened lawyers, rather than one of the numerous other senior counsel of record, lead the trial examination of a witness being questioned about the BMI Agreements. As detailed in *Broadcast Music Inc.'s Reply in Support of its Motion for a Limited Modification to the Protective Order in the Phonorecords IV Proceeding*, Dkt. No.

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<sup>2</sup> Although the Services continue to argue that the relief requested by BMI is unprecedented, a number of the Services have already agreed to a similar screen of counsel with SoundExchange in connection with this proceeding. *See* Order, Dkt. No. 25574. In fact, the limited relief sought here is much less complicated than the screen requested by SoundExchange, because BMI has identified a limited set of license agreements and a small, finite number of lawyers that need to be screened.

25697, *Phonorecords IV* (“BMI’s Reply”), there is at least one senior lawyer at each of the three impacted law firms who would be unaffected by the screen.

In any event, mere inconvenience to counsel or to the Services is an insufficient basis to deny BMI’s requested relief. *See Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525, 528 (N.D. Cal. 2000) (“The protective order must actually prejudice presentation of [Defendants’] case, not merely increase the difficulty of managing the litigation.”); *Sonix Tech. Co. Ltd.*, 2014 WL 11878353, at \*6 (limiting certain defense lawyers’ access to confidential information did not prejudice presentation of case where the information could be shared with defendants’ co-counsel and expert).

Moreover, BMI has shown that good cause exists for BMI’s proposed Protective Order modification. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 2004 WL 2009414, at \*2 (D.D.C. May 17, 2004). As set forth in the Parness Declaration,<sup>3</sup> the three counsel at issue have negotiated—***and/or are currently negotiating***—directly with BMI on behalf of the Services and dozens of other digital licensees. Parness Decl. ¶¶ 3-5, 7-8. BMI will be at an unfair disadvantage in those ongoing license negotiations, in addition to any future license negotiations in which those counsel are involved, if they are given access to the BMI License Agreements. *Id.* ¶ 10.

The Services do not dispute the facts in the Parness Declaration.<sup>4</sup> Rather, the Services admit that those three lawyers have had access to dozens and dozens of confidential BMI license

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<sup>3</sup> *See* Declaration of Evan Parness, Assistant Vice President of Digital Licensing, BMI, dated September 28, 2021, Dkt. 25697.

<sup>4</sup> The Services assert that the facts set forth as to Mr. Wetzel are “misleading,” but the Services fail to set forth any facts of their own to support that statement. *See* Sur-Reply at n.1. It is unclear how BMI’s statements are “misleading.” BMI submits that the facts set forth in the Parness Declaration are sufficient to establish that Mr. Wetzel is a competitive decisionmaker on behalf of Spotify. *See* Parness Decl. ¶ 8.

agreements in various litigation contexts over the years, *see* Sur-Reply at 3, and still continue to negotiate directly with BMI in license negotiations on behalf of digital licensees and advise their clients with knowledge of the terms of those confidential agreements. The Services effectively concede that there has already been some harm to BMI, and urge the Judges to turn a blind eye to the incremental harm that BMI would incur as a result of the disclosure of the BMI License Agreements.<sup>5</sup>

Contrary to the Services' assertions, *see* Sur-Reply at 4, Mr. Greenstein, Mr. Marks, and Mr. Wetzel must be screened because they are the very definition of "competitive decision-makers" for their digital licensee clients: they provide advice and counsel that may affect their clients' licensing decisions, and directly negotiate license transactions with businesspeople at BMI on behalf of those clients.<sup>6</sup> *See* Parness Decl. ¶¶ 3-5, 7-8, 10; *see also Sonix Tech. Co. Ltd.*, 2014 WL 11878353, at \*2 ("Competitive decisionmaking refers to 'a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions . . . made in light of similar or corresponding information about a competitor.'") (citation omitted). Because Mr. Greenstein, Mr. Marks, and Mr. Wetzel are all "competitive decision-makers," BMI has shown good cause to restrict them from viewing the BMI

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<sup>5</sup> The Services ignore that the proper standard for the Judges to apply in evaluating BMI's motion is "potential" future harm to BMI, not past harm. *See* BMI's Reply at 5. The instant motion seeks to minimize the potential future harm to BMI.

<sup>6</sup> According to Mr. Greenstein's website biography, for example, he "regularly represents companies in transactions with record labels, music publishers, and program suppliers." Wilson Sonsini, <https://www.wsgr.com/en/people/gary-r-greenstein.html> (last visited Oct. 18, 2021). Mr. Wetzel's website biography similarly notes that he "regularly counsels large and small clients on various . . . licensing . . . matters associated with various forms of traditional and new media." Latham & Watkins LLP, <https://www.lw.com/people/joseph-wetzel> (last visited Oct. 18, 2021). Mr. Marks "frequently represents . . . web site operators in connection with the acquisition of . . . rights to publicly perform musical compositions[.]" Weil Gotshal & Manges LLP, <https://www.weil.com/people/benjamin-marks> (last visited Oct. 18, 2021).

License Agreements. *Intel Corp.*, 198 F.R.D. at 529-30 (risk of disclosure may outweigh need for confidential information where counsel is involved in “competitive decision-making,” such as advice and counsel affecting licensing decisions).

### **CONCLUSION**

For the foregoing reasons, BMI respectfully requests that the Judges grant BMI’s motion and require the Services to screen the three outside counsel who are directly involved in negotiating license agreements with BMI from the BMI License Agreements.

Respectfully submitted,

Dated: October 18, 2021

BROADCAST MUSIC, INC.

/s/ Atara Miller / jtc

Atara Miller  
NY Bar No. 4126314  
MILBANK LLP  
55 Hudson Yards  
New York, New York 10001  
Telephone: 212-530-5000  
Facsimile: 212-530-5219  
[amiller@milbank.com](mailto:amiller@milbank.com)

/s/ Jennifer T. Criss

Brian A. Coleman (DC Bar No. 459201)  
Jennifer T. Criss (DC Bar No. 981982)  
1500 K Street, NW, Suite 1100  
FAEGRE DRINKER BIDDLE & REATH LLP  
Washington, DC 20005  
Telephone: 202-842-8800  
Fax: 202-842-8465  
[brian.coleman@faegredrinker.com](mailto:brian.coleman@faegredrinker.com)  
[jennifer.criss@faegredrinker.com](mailto:jennifer.criss@faegredrinker.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of October, 2021, a copy of the foregoing Broadcast Music, Inc.'s Response to the Services' Sur-Reply in Further Opposition to Broadcast Music, Inc.'s Motion for a Limited Modification to the Protective Order in the *Phonorecords IV* Proceeding was filed electronically using eCRB, which will automatically provide electronic service copies to all counsel and *pro se* participants who are registered to use eCRB. *See* 37 C.F.R. § 303.6(h)(1).

/s/ Jennifer T. Criss

Jennifer T. Criss

# Proof of Delivery

I hereby certify that on Monday, October 18, 2021, I provided a true and correct copy of the BMI's Response to the Services' Sur-Reply in Further Opposition to BMI's Motion for a Limited Modification to the Protective Order to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kelloggghansen.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Signed: /s/ Jennifer T. Criss